Supreme Court, U. S.
FILED
SEP 30 1974
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IN THE

United States Supreme Court

OCTOBER TERM 1974

No. 74-27

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF AND MOTION TO CONSOLIDATE

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September, 1974.

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Petitioner, The Long Island Rail Road Company ("LIRR"), files this reply and supplemental brief and motion to consolidate pursuant to Rules 24(4), 24(5) and 43(5) of the Rules of this Court.

Motion to Consolidate

In the case at bar, LIRR seeks review of the decision and orders of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179, 496 F.2d 21. The question presented is whether LIRR should, as clearly provided by law, receive its local rates as its compensation for performance of its share of joint-line rail transportation service under *unlawfully* established joint rates, or, as the Court of Ap-

peals held, receive only such damages as it could prove under a formula which simply defies proof. The same question is involved in No. 74-35, *The Long Island Rail Road Company* v. *United States of America, et al.*, which is an appeal as of right under the provisions of 28 U.S.C. §§ 1253 and 2101(b) from the order of a statutory three-judge District Court for the Eastern District of New York in *The Long Island Rail Road Co.* v. *United States, et al.*, —— F. Supp. —— (Civil Action No. 73-C-310, Order filed July 26, 1974).

The petition for a writ of certiorari filed by LIRR herein involves increases in the LIRR's joint rates unlawfully established over LIRR's objections in 1969. Prior to the decision of the District Court on August 23, 1972, LIRR's joint rates were unlawfully increased over its objections two additional times. Subsequent to the District Court decision, the Interstate Commerce Commission ("Commission") approved still a fourth unlawful increase in Ex Parte No. 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 288, decided September 27, 1972.

The fourth unlawful increase in LIRR's joint rates[1] was made the subject of a separate complaint by LIRR before a three-judge statutory District Court[2] for the Eastern District of New York. Shortly after filing its petition for

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[1] In the subsequent general-increase proceedings, beginning with Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, decided November 16, 1973, LIRR's right of independent action was finally recognized and its joint rates were not increased. The decision in Ex Parte No. 295 was after the Court of Appeals decision sustaining LIRR's position on November 7, 1973, but the Commission was evidently unaware of the decision (344 I.C.C. 594, footnote 2).

[2] The actions in the case at bar were initiated by Ajayem Lumber Corp., an interested shipper, against LIRR and its connecting railroads and by those connecting carriers against LIRR before a single-judge District Court, and LIRR's subsequent third-party plaintiff action was consolidated with those two actions.

a writ of certiorari on July 29, 1974, LIRR learned that the statutory three-judge District Court on July 26, 1974, had granted LIRR's motion for summary judgment, stating that the action in that case "is in all respects governed by the decision of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Transportation Co.*, 487 F.2d 179 (1973), . . .". Relying on "absence of jurisdiction," however, the three-judge District Court denied LIRR's request that it be permitted to retain its local rates as its divisions of the unlawful joint rates. A copy of the order of the District Court is reproduced in Appendix A (pp. 16-17).

Since the two cases involve the same question, LIRR moves, pursuant to the provisions of Rule 43(5), that they be argued together as one case, if the Court decides to hear argument, or decided together on the pleadings, if the Court decides oral argument is not necessary.

Reply to the Brief in Opposition of the Interstate Commerce Commission

Throughout these proceedings, counsel for the Commission have kept coming up with new and novel arguments in trying to defend the Commission's actions which, it now seems clear, were recognized as unlawful by all concerned from the start. In the Commission's brief in opposition to the instant petition for certiorari, at least three new arguments are advanced.

In probably its most important new argument, the Commission correctly states that Rule 52(b) is applicable to situations like the present one where a non-concurring carrier's rates are unlawfully increased over its objections. The Commission correctly states (at p. 6):

> "Where it has not lawfully concurred, it must demand payment under its lawful tariffs and may not seek to

> collect under the tariff in which it has not concurred. So here, when initially confronted with the Ex Parte No. 262 increases on its joint rates which it believed unlawful, LIRR properly sought to collect under what it contended was its lawful tariff."

The Commission concedes the Court of Appeals sustained LIRR's position that the increased joint rates were unlawful, and the Commission does not argue that the tariff containing LIRR's local rates is in any way unlawful. The next logical step would obviously be for the Commission finally to admit that LIRR is entitled to collect its local rates out of the unlawful joint rates.

Instead, the Commission makes the following new argument (at p. 6);

> "However, that effort was superseded when LIRR acceded to a stipulation in the district court under which it continued to collect its division of the increased joint rate."

The argument can only be described as incredible.

LIRR argued strongly that it should be permitted to collect its local rates and put the difference between the local rates and its normal divisions in escrow *pendente lite*, but could not convince the District Court to adopt this procedure. As the opinion of the District Court makes clear, the Court obtained "the agreement of the parties to resume service on a *status quo* basis, reserving to the LIRR the right of making a retroactive adjustment if its position was upheld, . . .". (350 F.Supp. 116)

The Commission also evidently overlooked the last paragraph of the District Court's decision, which provided as follows:

> "Therefore, the LIRR is hereby permanently enjoined from refusing to accept freight cars tendered to it upon the presently agreed upon basis of divisions of

joint rates until the Commission makes its final determination in the case of *The Long Island Rail Road Co. v. The Ahnapee and Western Railway Company.*" (350 F.Supp. 121)

The final determination in the case referred to (which LIRR was unsuccessful in convincing the District Court had no bearing on the case at bar) was not effective until October 4, 1973. Evidently, the Commission's position is that in order to preserve its position that it was entitled to the local rates, LIRR should have violated the stipulation and acted in contempt of the District Court.

Thus, the Commission's argument that when LIRR "acceded" to the stipulation in the District Court it gave up its now sustained position that the increased joint rates were unlawful and it was therefore entitled to its local rates, is clearly and completely without any merit whatsoever.

The Commission also argues (at p. 7) that there is no statutory remedy nor prescribed remedy for the wrong found and that Rule 52(b) is merely "a technical rule of tariff procedure." (p. 5)

As was explained in LIRR's petition (at pp. 15-16), Rule 52(b) has the force of law and provides the exclusive remedy. If Rule 52(b) and the other rules and regulations adopted by the Commission in Tariff Circular No. 20 (49 C.F.R. § 1300.00, *et seq.*) do not have the force of law, then all of the recent general freight rate increases have been unlawful in their entirety and not just in regard to those imposed unlawfully upon LIRR traffic.

The present method of making general freight rate increases effective through the use of master tariffs and connecting-link supplements violates the provisions of Section 6(1) and 6(3) of the Interstate Commerce Act, which require that rates be plainly stated, changes be made by publishing new schedules, etc. The short-

form method of publishing general increases used today is made possible by special permission granted by the Commission under the provisions of Rule 58. (49 C.F.R. § 1300.58) If Rule 52(b) does not have the force of law, then neither does Rule 58, and all of the recent general freight rate increases would have to be ruled unlawful. The Commission simply cannot have it both ways.

The Commission questions, on factual grounds, LIRR's reliance on *St. Louis & O'Fallon Ry. Co.* v. *E. St. L. & S. Ry. Co.*, 81 I.C.C. 538, for the proposition that LIRR is entitled to its local rates (pp. 6-7, footnote 4), but that case is only one of many in which the Commission has so held. Where joint rates are unlawfully published and made effective—which is true whether the non-concurring carrier is not shown as a party to the tariff containing the joint rates to or from points on its lines or, as in the present case, is shown as a party without its authority—the Commission has consistently held that the non-concurring carrier is entitled to its lawful rates (usually the local rates).

For example, in *Chelsea Refining Co.* v. *Missouri Pac. Ry. Co.*, 38 I.C.C. 28, the Frisco railroad published a joint rate in connection with the Missouri Pacific, without the latter's authority. The unlawfully published joint rate was 10 cents per 100 pounds, and the Missouri Pacific rate for the short line-haul from the point of interchange to the destination was 7 cents. The Commission held that the shipper was entitled to the unlawfully published 10-cent joint rate, and did not have to pay a combination rate of 17 cents, and then went on to say (38 I.C.C. at 30):

> "In thus holding we are not to be understood as indicating that the Missouri Pacific under such circumstances may accept from the Frisco what the latter line has published as the Missouri Pacific's charge for the service, or that it may lawfully accept from the Frisco any less than its own lawfully published charge. The conclusions reached herein are fully supported by item

68 of Tariff Circular 18-A, and by *De Camp Bros.* v. *V. & S. W. Ry. Co.*, 22 I.C.C., 274; and *Edison Portland Cement Co.* v. *D., L. & W. R. R. Co.*, 22 I.C.C., 382."

We know of no case until now where the Commission or any court has ever held that a non-concurring carrier is entitled or required to accept as its compensation for performing service under unlawfully published joint rates anything other than the rates set forth in its own lawfully published tariffs, which are usually its local rates, and neither the Commission nor the other railroads cite any case where the non-concurring carrier has been forced to resort to an action for damages in lieu of collecting its local rates.

Finally, the Commission argues (at p. 5):

> "The only remaining issue is the measure of recovery to which LIRR is entitled as a result of this admittedly improper increase, an issue which is unlikely ever to recur, since the nation's railroads and the rate bureaus have ceased any efforts to include LIRR in joint-rate increases over LIRR's objections, and the Commission has authorized no such increase in any order entered since the court of appeals' decision."

The Commission's admission that it has "seen the light" and its promise that it will refrain from committing the same unlawful acts in the future—and it should be noted that the respondent railroads make no similar admission and promise in their brief—must be appraised in the light of the known facts, namely, the failure of both the Commission and the other railroads to take the steps necessary to rescind the "admittedly improper" increases still outstanding and applicable to LIRR traffic.

As was shown in LIRR's petition (at pp. 9-11), the formula for damages adopted by the Court of Appeals defies proof, and even if the amount of damages could somehow be determined, they could not be collected from the hun-

dreds of railroads which are not parties to these actions. The Commission and the railroads strenuously defend the Court of Appeals' damage formula, *but neither the Commission nor the railroads make the slightest attempt to argue that the amount of damages could actually be proved or collected.*

Thus, if the Court of Appeals' decision is allowed to stand, the Commission and the railroads in the future could deny with impunity any carrier's right of independent action guaranteed by Section 5a(6), knowing that there would be no penalties for their unlawful acts. Unless this Court reverses the Court of Appeals and holds that LIRR is entitled to its local rates, future similar violations of the law will be encouraged and will be almost certain to occur.

In arguing that LIRR is entitled to collect only damages during the "period of unlawfulness," the Commission evidently seeks to create the impression that the unlawful situation has been corrected. Nothing could be further from the truth. As the Commission correctly stated, the Court of Appeals held that LIRR "was entitled to a hearing before the new joint rates went into effect"; and that until such a hearing might be held, LIRR "had a right to insist on the maintenance of its existing joint rates" (p. 3). Yet, despite all of LIRR's efforts, the railroads have never filed tariffs to restore LIRR's joint rates to the last lawful level, and the Commission has never ordered them to do so. And, the railroads have not petitioned for, and the Commission has not on its own motion instituted, a Section 15(1) investigation and the hearing after which LIRR's joint rates might be lawfully changed. The present unlawfully increased LIRR joint rates remain in effect. Unless this Court reverses the Court of Appeals' holding that the LIRR's remedy is to try to prove damages under an impossible formula, it is unrealistic to expect either the Commission or the railroads to take any action to correct the present unlawful situation or to refrain from similar future violations.

As the Commission states, it has not authorized any further unlawful increases in LIRR's joint rates since the decision of the Court of Appeals. After sanctioning four unlawful increases in LIRR's joint rates, the Commission finally refused to permit a fifth, but this had nothing to do with the Court of Appeals' decision. The Commission's belated recognition of LIRR's right of independent action resulted when the Chessie System in Ex Parte No. 295, *Increased Freight Rates and Charges, 1973, Nationwide*, 344 I.C.C. 589, 595-596, originally indicated an intention to exercise its right of independent action. At the time, the Commission was unaware of the decision of the Court of Appeals (344 I.C.C. at 596). If the railroads and the Commission had thought the only remedy would be an action for damages under an impossible formula, they would have probably again denied the statutory right of independent action to LIRR. If the decision of the Court of Appeals is upheld, there would be no reason for the Commission to have any qualms about doing so in the future.

The simple fact is that under the provisions of the Interstate Commerce Act and the rules and regulations promulgated thereunder, there are only two ways a carrier can be compensated for performing its share of joint-line transportation. Where joint rates have been lawfully established by agreement of all participating carriers or by order of the Commission after full hearing under the provisions of Sections 15(1) or 15(3) (49 U.S.C. §§ 15(1), (3)), each participating carrier gets its agreed or prescribed division of the joint rates. Where no joint rates have been established, each carrier receives its local rates out of the total combination rate, and where, as in this case, joint rates have been unlawfully published, the nonconcurring carrier gets its local rates as its compensation for performance of its share of the transportation under the unlawful joint rates. The Court of Appeals clearly erred in substituting an impracticable formula for computing damages in lieu of the remedy provided by law in this case,

and the Commission's brief in opposition presents no valid arguments to support or defend the action of the Court of Appeals.

Reply to the Brief in Opposition of the Respondent Railroads

In their brief in opposition, the respondent railroads do not address themselves to the issues and arguments made in LIRR's petition. They do not deny that Rule 52(b) has the force of law or that it is the exclusive remedy. They do not contend that anyone could ever accurately compute the amount of damages under the formula adopted by the Court of Appeals (which is essentially the one suggested by the respondent railroads), or that LIRR could collect any damages it could somehow prove from the hundreds of other railroads which are not parties to these actions. Unlike the Commission, the respondent railroads do not even admit that they acted unlawfully, let alone state that the unlawful acts will not be repeated in the future if they would be immune from punishment or penalties, as they would be under the decision of the Court of Appeals.

Instead, they re-hash the irrelevant arguments they made before the lower courts, as to whether LIRR's decision to exercise its right of independent action was wise and whether LIRR had improper motives.[3] These arguments were properly ignored by the Court of Appeals in holding, as even the respondent railroads concede (at p. 3), that "the increase in joint rates was made without proper authority from the Long Island and that, in the circumstances, it was deprived of its right of independent action."

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[3] LIRR's freight traffic fell off sharply since the effectiveness of the unlawful increases in the joint rates and its freight revenues have also declined since 1968, the last year before the unlawful general increases. These facts are immaterial, however, since LIRR has a statutory right to take independent action, whether such action be wise or unwise and for whatever purpose.

Since the respondent railroads did not seek review of the decision of the Court of Appeals, most of their arguments have no bearing on any issue presently before this Court.

The railroads do not deny that, as stated in LIRR's petition (p. 11), the chairman of the principal rate bureau involved had testified that by unlawfully denying LIRR its statutory right of independent action, the Eastern railroads were able to get $100 million annually from the first of the four unlawful increases which they otherwise would not get were it not for their unlawful action. Yet, they argue that for LIRR to collect its local rates, as required by law, would result in a "windfall" for LIRR.

At page 3 of their brief, the railroads argue:

> "Had the Long Island's position been upheld, the result would have been that its divisions would have been trebled and its connecting carriers (most of which are in bankruptcy) would have been required to haul the traffic, or much of it, without receiving anything for the transportation performed by them (439a)."

Page 439a of the record in the Court of Appeals, cited in the above quote from the railroads' brief, is reproduced in Appendix B hereto at page 19, but there is nothing therein to support the statements made. Since local rates would vary greatly, depending on the commodity, origin and destination, etc., it has not been determined by what amount LIRR's local rates would exceed the divisions it would receive out of lawfully established joint rates, but the suggestion that LIRR's earnings would be trebled seems appropriate in view of the treble damages awarded for violations of the antitrust laws. But even if LIRR's local rates were three times its divisions of lawful joint rates, this would not result in the other railroads being required "to haul the traffic, or much of it, without receiving anything for the transportation performed by them," as they claim. In the proceeding referred to in the District Court's

opinions (350 F. Supp. at 121), *The Long Island Rail Road Co.* v. *The Ahnapee and Western Railway Co.*, I.C.C. Docket No. 35153, October 4, 1973 (not printed), LIRR's average division was shown to be less than 15 percent of the total joint rates involved. Thus, even if LIRR's divisions were trebled—and it is extremely doubtful that the local rates would amount to three times the normal divisions—LIRR would still receive less than half of the average joint rates.

In any event, even if LIRR gets its local rates, the other railroads will still be able to keep 90 percent or so of their ill-gotten gains.

Referring to the governing regulation (49 C.F.R. § 1300.52(b)), which is set forth at pages 13-14 of LIRR's petition, the respondent railroads argue (at pp. 3-4):

> "Long Island argues, however, that the aforesaid tariff rule of the Commission requires that it take its local rate as its divisional share of the joint rates. That no such arbitrary result is required is shown by the fact that Long Island concurrently urges the contrary position, i.e., that the taking of its local rates as divisions is required or permitted by the tariff-circular rule upon which it relies (92a)."

It is difficult to understand what it is the respondent railroads are arguing, and an examination of the referred to page 92a of the record in the Court of Appeals (reproduced in Appendix B hereto at page 18), provides little help.[4] The railroads' intended argument may be that at several points during the initial argument before the District Court, counsel for LIRR stated that the use of the word "must" in the governing regulation made it at least permissible, if not absolutely mandatory, for LIRR to collect its local rates as its divisions of the unlawful

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[4] The cited page does, however, make it clear that the issue before the District Court was whether or not LIRR was entitled to its local rates, and not whether or and presented no question of damages.

joint rates. Or, it may be a reference to LIRR's offer in the District Court and the Court of Appeals to retain as its divisions only so much of the local rates, to which it was entitled, as was necessary to eliminate LIRR's freight deficits during the years the unlawful joint rates are in effect, with no profit or return on investment, and to return any balance to the other railroads by means of voluntarily renegotiating the divisions on the past shipments.

As they keep stressing, a few of the respondent railroads (but not the rest of the several hundred carriers from whom LIRR's local rates would be collected) are in bankruptcy in their attempt to generate sympathy. They do not mention that LIRR's freight operations are relatively much more unprofitable, with its total freight revenues running less than half of its freight expenses. There would have been nothing wrong if LIRR had insisted upon collection and retention of the local rates to which it is entitled by law and shown a profit from its freight operations, as do the vast majority of the railroads in the country. However, because of the bankruptcy of some of its principal connections, LIRR stipulated in the courts below that it would retain only so much of the local rates as was necessary to eliminate its freight deficits and forego the rest of the difference between its normal divisions and its local rates, through voluntary renegotiation of past divisions. If such action is to be construed as a voluntary waiver by LIRR of its right to local rates in favor of an action for damages under some undisclosed theory of law against parties not subject to the jurisdiction of the court, then LIRR is perfectly willing to collect and retain all of the local rates.

Finally, the respondent railroads argue (at p. 4):

> "Moreover, the Long Island has been free at any time to restrict the concurrences which it has on file with the Interstate Commerce Commission, thus mitigating its damages. But it never sought to mitigate."

As discussed above, establishment of the unlawful joint rates did not give LIRR the right to sue for damages under some theory of contract or tort, but the right to collect its local rates as its divisions of the unlawful joint rates. Even if the situation were such that LIRR could prove and collect damages which would exceed the difference between its local rates and its normal divisions, LIRR could not bring such an action for damages, since Rule 52(b) clearly provides the exclusive remedy for the violation of law.

So far as seeking to mitigate is concerned, LIRR has sought on several occasions to have the unlawfulness removed by restoring the last lawful level of rates to which it has agreed, which would result in depriving LIRR of its right to collect local rates from that time on, but to no avail. The respondent railroads, on the other hand, have not taken the action available to them to terminate their liability for the local rates.

In its reply brief in the Court of Appeals, the United States, which has supported LIRR below, correctly pointed out (at p. 16):

> "We submit that the procedure which the LIRR followed is the most effective way to compel the agent to file a flag-out. It was the other railroads who countermanded LIRR's instructions, caused the agent to refrain from filing the necessary 'flag-out', and forced a joint rate upon the LIRR over its objections. Requiring those railroads to pay the LIRR its local rates until the appropriate 'flag-out' is filed should provide a sufficient inducement to cause them to change their instructions to TEA-ER. Such a procedure will protect the LIRR's statutory right of independent action without creating any deviation from the formalities which Congress has established for effectuating rate changes. We submit that neither the Commission, the appellee railroads nor the district court has presented any sufficient reason for failing to apply that remedy in this case."

Conclusion

Under the Interstate Commerce Act and the regulations promulgated thereunder, a non-concurring railroad should receive its local rates as compensation for performance of its share of a joint-line movement where joint rates have been unlawfully established over its objections. We know of no provision of law requiring or permitting a carrier to receive its normal divisions plus damages for performance of its share of joint-line transportation, instead of its local rates. The decision of the Court of Appeals does not explain under what theory this could be done, and neither the Commission nor the respondent railroads suggest any.

The case at bar presents a classic example of abuse of the administrative process. If the decision below were allowed to stand, the right of independent action guaranteed in Section 5a(6) would be effectively repealed without any action by the Congress.

For the foregoing reasons and those stated in the petition filed earlier herein, it is respectfully urged that the Court should issue a Writ of Certiorari to review the judgments, orders and opinions of the United States Court of Appeals for the Second Circuit and should consolidate this action with that in No. 74-360, which involves the same questions.

Respectfully submitted,

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September, 1974

Appendix A.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 73-C-310

THE LONG ISLAND RAIL ROAD COMPANY,

Plaintiff,

against

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Intervenors as Defendants.

ORDER

Plaintiff's motion for summary judgment having come on for hearing on May 28, 1974, before a three-judge panel comprised of the undersigned and designated to hear and determine the issues herein, and the Court having considered the pleadings, memoranda and argument of counsel, and all other matters presented to it;

And it appearing that this action is in all respects governed by the decision of the United States Court of Appeals for the Second Circuit in *Ajayem Lumber Corp.* v. *Penn Central Trannsportation Co.*, 487 F.2d 179 (1973), as subse-

quently clarified and supplemented, and that the motion for summary judgment should therefore be granted to the extent set forth below;

NOW, THEREFORE, it is

ORDERED that plaintiff's motion for summary judgment be and it is hereby granted in part, as follows:

The Orders of the Interstate Commerce Commission entered in its proceeding Ex Parte No. 281, *Increased Freight Rates and Charges, 1972,* 340 I.C.C. 358 (1971); 341 I.C.C. 288 (1972) are hereby vacated, set aside, and annulled to the extent that such orders authorized increases in joint rates on traffic between points on the lines of Long Island Railroad Company and points on the lines of other railroads; and it is further

ORDERED that in the absence of jurisdiction in this Court the application of the Long Island Railroad Company for determination of damages incurred as a result of the application of the Ex Parte No. 281 increase to the rates to and from stations on its line be and it is hereby denied.

LEONARD P. MOORE
Lecnard P. Moore
United States District Judge

JOHN R. BARTELS
John R. Bartels
United States Circuit Judge

MARK A. COSTANTINO
Mark A. Costantino
United States District Judge

Dated: Brooklyn, N. Y.
July 26, 1974

Appendix B.

Transcript of Hearing, December 16, 1969

The Court: Yes. I so direct both of you gentlemen to contact the I. C. C.

Mr. Kaier: I'll be happy to do it, too. I can't do it tomorrow, though, but Mr. Murphy can go down tomorrow.

Mr. Murphy: I can.

The Court: Off the record.

(Discussion off the record.)

The Court: What would you put up to the Commission? What would be the issue?

Mr. Kaier: As I understand it, it is whether the Long Island is now – may now or must now collect its local rate on interline traffic.

Mr. Hoffmann: May I add to that?

Mr. Myskowski: As its division.

Mr. Hoffmann: And withhold it.

Mr. Kaier: You haven't said that.

Mr. Hoffmann: And withhold it from our money.

Mr. Kaier: All right, as its division.

(83) The Court: It is a good thing I practiced law at one time.

Mr. Myskowski: We are getting our case cornered in here, your Honor.

The Court: I know.

Let me ask you this: Is this going to be—

Mr. Kaier: Pardon me, your Honor.

The Court: Will this be a decision on the merits?

Mr. Kaier: I think it would be just a decision on that principle.

The Court: It would simply be a temporary adjudication? I mean, for a temporary situation, not on the merits at all; would it?

Mr. Myskowski: That's right, your Honor. It would govern until the Commission finally decides *ex parte* 262, which is the six per cent increase rate.

The Court: They have not decided that yet?

backing up in some cases beyond the borders of Eastern Territory. A significant example would be the effect on the eastbound transcontinental rate on lumber. A blanket rate applies to all stations from Group D (Chicago area) to the Atlantic Ocean. At the Ex Parte 259 level that rate is $1.51 per 100 lbs. At the Ex Parte 262 level it is $1.60. If a $1.51 rate is restored to all Long Island stations, that rate will have to be reinstated also all the way back to the western boundary of Group D, west of Chicago. As to other commodities, the same would be true as far west as Pittsburgh, Pa. on traffic to and from transcontinental territory. Also, the same problem would exist in connection with interterritorial rates to and from the south.

In my opinion, maintenance of lower rates to and from the Long Island's stations in the New York rate group than would apply to and from other stations in the New York rate group would be destructive of the rate structure and would cause a loss of large sums of money to the railroad industry, affecting the revenues of the Long Island's direct connections most seriously. Exemption of the rates to and from the important part of the New York metropolitan area served by the Long Island from the 6 percent increase would place such stress on the rate structure as to cause exemption of the increase from other rates. I am convinced that if